IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 983 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MAHEMUDMIYA LATIFMIYA & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

MR SIKANDER SAIYED for MR SUNIL C PATEL for Appellant(s) : 1 - 2.
MS HB POONANI PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 03/12/2007

ORAL JUDGMENT

1.0 The appellants, herein, have challenged the judgment and order dated 19th October, 1996

rendered by the learned Additional Session Judge, Surat in Criminal Case No.129 of 1993.

2.0 As per the prosecution case, the appellants-original accused on 15.08.1993 at about 4:30 in the evening asked one Jitendra Surjibhai Gamit to get liquor for them. When he refused, the accused gave fist blows and accused No.2 lifted him off the ground and threw him down, thereby causing fracture on his right hand. The accused were charged with offence punishable under Section 325 read with Section 114 of the Indian Penal Code as well as Section 3(1)(5) and 3(1)(10) of the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act(hereinafter referred to as the 'Atrocities Act').

3.0 The learned Additional Session Judge acquitted accused of the offences punishable under Section 3(1)(5) and 3(1)(10) of the Atrocities Act. However, the appellants-accused were convicted under Section 325 of the Indian Penal Code and were sentenced to undergo

imprisonment for a period of two years and to pay a fine of Rs.1,000/-.

4.0 To establish the charge, prosecution examined several witnesses. P.W.-3- Jitendra Surjibhai Gamit, the injured boy was examined at Exhibit-12. In his deposition, he has stated that on 15.08.1993 since there was holiday in his school he was playing near his house at which time the accused persons came there, gave him money and asked him to fetch liquor for them. When he refused, they pushed him around and he was banged on the ground by pulling him from the leg. He suffered fracture on his hand because the entire weight of his body came on his hand. These people, thereupon, took him to the hospital and asked him to give the history of having fallen down from mango tree. Then, the accused ran away. His parents came to the hospital thereafter.

5.0 In his cross-examination he denied that there was fresh rain and that therefore the

ground was wet. He denied the suggestion that since accused did not lend him money he had filed the false complaint against them.

6.0 P.W.-5- Jaisangbhai Bharatbhai was examined at Exhibit-14. He has stated that on the date of incident at about 3:00 clock when he was playing, the accused came there. They were already drunk. They asked him to bring more liquor for them. When he refused and Jitendra came there, they gave him Rs.5/- and told him to get liquor. When he refused, they pushed him and gave fist blows in his stomach. They pulled his leg and made him to fall down on the ground due to which his right hand was broken. Thereafter, the witness went to call Jitendra's mother. The witness identified the accused persons as Salim and Mehmood out of the persons sitting in the Court.

6.1 He stated that, though, he worked in a hotel on the date of incident, he had not gone for work because it was a holiday. He denied the

suggestion that since Jitendra was his friend he was giving false evidence.

7.0 Krishna Surjibhai Gamit-P.W.-7 who was examined at Exhibit-17, is brother of the injured Jitendra. He stated that on the the date of incident he was playing with few other persons. At that time, Salim; accused No.2 asked him to get liquor which he refused. Soon thereafter Jitendra came there. He was also asked to get liquor which he refused. Upon which, the accused gave fist blows and accused No.2 made him to fall down on the ground on account of which, his brother's hand broke and he started crying. The witness went to call his mother. By the time he came to the spot along with his mother, Jitendra was already taken to the hospital.

7.1 He denied that Jitendra tried to borrow money from the accused.

8.0 Dr. Gangaram Ramumal-P.W.-1 who was examined at Exhibit-9, is Medical Officer of

Smarak Hospital where injured Jitendra was brought for treatment on 15.08.1993. He stated that Jitendra was treated as an indoor patient from 15.08.1993 to 20.08.1993. Jitendra had swelling and deformity of bone. Upon x-ray he found that the patient had fracture of radius and alena. He stated that Jitendra gave history of falling down from a tree. He stated that such injury could be caused if a person was lifted from the ground and thrown down.

8.1 In his cross-examination he stated that such injury could also be caused if a person fell down from a tree.

9.0 Before evaluating the evidence of these witnesses, it may be noted that there are certain other witnesses whose depositions would not directly help the prosecution. Though, it would be appropriate to deal with the depositions of such witnesses.

10.0 Surjibhai Noorjibhai Gamit-P.W.-2 who was

examined at Exhibit-11 is father of injured Jitendra. He clearly stated that he was not eye-witness to the incident and his version is based on the narration of other persons and his son.

11.0 Vijaybhai Ramubhai Gamit-P.W.-4 who claimed to be an eye-witness and was examined at Exhibit-13, had in fact not witnessed the incident himself. In his deposition, he sated that after Jitendra was shifted to the hospital by his mother, he does not know what happened. This is clearly in contrast to depositions of other prosecution witnesses who have stated that Jitendra was shifted to the hospital by the accused and by the time Jitendra's mother arrived at the spot, he was already shifted to the hospital. Further in his cross-examination, he admitted that he came to know about the incident when he came from work and that he was told about the incident by Jitendra's mother. This witness, therefore, does not throw any light on the exact nature of the incident in question.

12.0 Jamnaben Surjibhai Gamit-P.W.-6 who was examined at Exhibit-15 is mother of Jitendra. She had given the complaint before the police. In so far as lodging of the complaint is concerned, her deposition is relevant. She stated that at about 5:00 clock in the evening, her son Krishna came running and told her that the accused persons had beaten up Jitendra since he refused to get liquor for them. She, therefore, rushed to the spot but found that Jitendra was already shifted to the hospital. She subsequently lodged complaint with the police.

12.1 Her deposition, however, is not that of an eye-witness and her evidence is useful only for the purpose of ascertaining the evidence subsequent to the actual incident leading up to filing of the complaint.

13.0 Despite discarding the evidence of Surjibhai-P.W.2, Vijaybhai-P.W.4 and Jamnaben-P.W.-6 with respect to exact nature of the incident, the question remains whether the

prosecution succeeds in proving the charge against the accused or not.

14.0 As noted earlier, Jitendra-P.W.-3 is an injured eye-witness. He, in his deposition, clearly stated that on the date of incident upon refusing to fetch liquor for the accused, they assaulted him and he was thrown on the ground by pulling his leg and since entire weight of his body came on his right hand, he suffered fracture.

15.0 The injured witness and the accused reside in the same locality. It was bright day light. Identification of the accused, therefore, was not in doubt.

16.0 His version was supported by another eye-witness Jaisangbhai-P.W.-5. He stated that he was present at the scene of incident. The accused had asked Jitendra to fetch liquor for them, he declined, and hence, he was pushed and given fist blows and was banged on the ground by pulling his

legs.

17.0 Brother of injured Jitendra namely Krishna-P.W.-7 also supported his version. He was also present when the incident took place. He had rushed to call his mother after the incident.

18.0 No material contradictions have emerged from the cross-examination of these witnesses. All the three have consistently stated that on the date of incident, the accused asked Jitendra to fetch liquor for them and when he declined, they had beaten Jitendra and banged him against the ground which resulted into injury on his right hand.

19.0 Dr. Gangaram-P.W.-1 also diagnosed fracture on the right hand of the injured Jitendra.

20.0 I do not find that the prosecution version is not believable or acceptable. Merely, because the Doctor noted down the history of

falling down from the tree, the prosecution version cannot be discarded. In fact, a very plausible explanation has been rendered for the said history. Injured Jitendra stated that the accused brought him to the hospital and threatened him to give the history of falling down from the tree. One may recall that Jitendra was aged about sixteen years at that time. If, on account of fear of the accused persons, he did not give the history of being beaten, the same cannot be a factor in favour of the defence.

21.0 Under the circumstances, I find that the learned trial Judge committed no error. The charge against accused stand proved.

22.0 In so far as the question of sentence is concerned, I find that the incident is an old one and more than fourteen years have passed since then. Accused are not stated to be habitual or hardened criminals. Nothing untoward is reported since their conviction though they were enjoying bail virtually throughout the trial and during

pendency of the appeal. Further more, it appears to be a case where though the accused beat the complainant, the intention was not to cause any serious injury. The complainant-Jitendra seems to have suffered fracture on account of falling down on the ground and entire weight of his body being supported by his right hand. Accused themselves carried injured to the hospital further showing that they are not hardened criminals. Under the circumstances, though, the conviction of the accused-appellants is maintained, they are given benefit of probation.

23.0 In the result, therefore, while disposing of the appeal I hold that the conviction recorded by the learned trial Judge against the appellants is not required to be disturbed. The appellants, however, for the reasons noted hereinabove are given the benefit of probation.

(AKIL KURESHI, J.)

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